Verizon Information Systems and Communications Workers of America, Petitioner. Case 22–RC–12067

August 27, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 16, 2001, the Regional Director for Region 22 denied the Employer's request to dismiss or hold in abeyance the representation petition filed in this case because of a pending arbitration over the scope of the appropriate bargaining unit of the Employer's employees.[1] On April 24, 2001, the Employer filed an "Emergency Request for Review" of the Regional Director's denial of the Employer's request. The Petitioner filed an opposition. By order dated May 9, 2001, the Board granted the Employer's request for review.[2] Both parties filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the record in this case, including the Employer's and the Petitioner's briefs on review.[3] For the reasons set forth below, we dismiss the petition.

I. FACTS

The Employer sells advertising in printed and electronic phone directories throughout the United States. It was formed in the summer of 2000 following the merger of Bell Atlantic Corporation and GTE Corporation and now consists of the former employees of Bell Atlantic's directory companies and those of GTE's directory services.

The former Bell Atlantic directory employees operate in several northeastern and mid-Atlantic states. The Petitioner represents some of these employees, while others are unrepresented. On August 5, 2000, collective-bargaining agreements between the Petitioner and the former Bell Atlantic directory companies expired, and a strike immediately commenced.

On August 23, 2000, the Petitioner and the Employer executed a "Memorandum of Agreement Regarding Neutrality and Card Check Recognition" (Agreement), effective by its terms from August 6, 2001, to August 6, 2003. The Agreement applies to the "Directory South Sales" (south sales) employees of the former Bell Atlantic directory companies. The south sales area includes employees in New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia.

The Agreement provides, in relevant part:

> Section 3(a):
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> When requested by the Union, the Companies agree to furnish the Union lists of employees in the bargaining units. This list of employees will include the work location, job title and home addresses.
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> Section 3(b):
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> The Union will give twenty one (21) days' notice for access to Company locations. Access will be limited to one sixty (60) day period in any twelve months for each unit agreed upon or determined as provided herein.
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> Section 3(c)(1):
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> The Union and the Companies shall meet within a reasonable period, but not to exceed ninety (90) days, after the effective date hereof for the purpose of defining appropriate bargaining units for all presently existing potential bargaining units. In the event the parties are unable to agree, after negotiating in good faith for a reasonable time, upon the description of an appropriate unit for bargaining, the issue of the description of such unit shall be submitted to arbitration administered by, and in accordance with, the rules of the American Arbitration Association (AAA). The arbitrator shall be confined solely to the determination of the appropriate unit for bargaining and shall be guided in such deliberations by the statutory requirements of the National Labor Relations Act and the precedential decisions of the National Labor Relations Board and Appellate reviews of such Board decisions. The parties agree that the decision of the Arbitrator shall be final and binding.
> . . .
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> Section 3(d):
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> The Companies agree that the Union shall be recognized as the exclusive bargaining agent for any agreed-upon or otherwise determined bargaining unit(s) not later than ten (10) days after receipt by the Companies of written notice from the American Arbitration Association ("AAA") that the Union has

[1] A representation hearing was held on April 17, 2001, but no decision has been issued by the Regional Director.

[2] Member Walsh, dissenting, would have denied review.

[3] The Employer filed motions to strike the Petitioner's brief on review and the Petitioner's response to the Employer's motion to strike its brief. The Employer's motions are denied.

> presented valid authorization cards signed by a majority of the employees in such unit(s).
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> Section 3(g):
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> As soon as practicable after the aforesaid recognition and upon written request by the Union, the Companies shall commence bargaining in good faith with the Union with respect to wages, hours, and other terms and conditions of employment for the employees employed within the agreed upon or otherwise determined appropriate bargaining unit.
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> Section 4(a):
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> The Companies agree, and shall so instruct all appropriate managers, that the Companies will remain neutral and will neither assist nor hinder the Union on the issue of Union representation.

Shortly after execution of the Agreement, the Petitioner contacted the Employer about organizing employees covered by the Agreement. Pursuant to the Agreement, the Employer furnished information to the Petitioner regarding the number and classifications of employees at various locations in New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia. In the fall of 2000, the parties discussed the scope of appropriate bargaining units. The parties disagreed over whether employees should be organized in single office units, as contended by the Petitioner, or in a single unit of the entire south sales area as contended by the Employer.

On January 10, 2001,[4] the Petitioner wrote to the Employer that "[a]t this point we are at an impasse on the make up of the bargaining unit." Invoking the procedure under the Agreement, the Petitioner indicated that "the next step would be to submit this issue to arbitration," and proposed a list of potential arbitrators "who have knowledge of and experience in the subject of neutrality/bargaining units." The Employer replied that the issue was not ripe for arbitration, but the Petitioner continued to press for arbitration of the dispute. By March 21 the parties had agreed to submit the unit issue to the AAA, and the arbitration hearing was scheduled for June 6.

By letter dated March 29, the Petitioner informed the Employer's New Jersey employees that it had "notified Verizon that a majority of the VIS [Verizon Information Systems] employees have chosen representation with CWA" and that "[if] they do not agree to a card check, CWA will file a representation petition with the National Labor Relations Board." The letter went on to state that "[w]ith a determination from the NLRB on appropriate bargaining units we could either revert to card check or the NLRB will conduct an actual election at your workplace."[5]

On April 2 the Petitioner filed the instant representation petition seeking to represent a unit of sales and related classifications of employees at the Employer's Somerset, Paramus, and Marlton, New Jersey offices.

By letter dated April 13, the Employer requested that the Regional Director dismiss the petition or hold it in abeyance because the parties had agreed on a procedure to resolve the unit scope issue, and as part of that procedure, the issue had been scheduled for arbitration on June 6, 2001. By letter dated April 16, the Regional Director denied the request, concluding that the Board does not defer to arbitration in representation proceedings involving unit scope issues, the resolution of which turns on statutory policy.

The Employer seeks review of the Regional Director's decision, contending that the petition should be dismissed in light of the parties' Agreement. We find merit in the Employer's contentions.

II ANALYSIS

"[N]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations." *Pall Biomedical Products Corp.*, 331 NLRB No. 192, slip op. at 4 (2000).[6] See also *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), and *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). The Board will enforce such agreements, including agreements that explicitly address matters involving union representation.[7]

[4] All dates are in 2001 unless otherwise noted.

[5] When the Employer moved to admit this letter into the record, the Petitioner stipulated that it was written by the Petitioner but objected to its admission on relevancy grounds. The hearing officer agreed with the Petitioner and placed it in the rejected exhibit file. We reverse the hearing officer's ruling, find that the letter is relevant, and admit it into the record.

[6] Chairman Hurtgen does not rely on *Pall Biomedical*, a case in which he dissented. In that case, unlike here, the agreement (in Chairman Hurtgen's view) required recognition even in the absence of majority status. In addition, Chairman Hurtgen concluded that the clause was a nonmandatory subject of bargaining. Thus, an 8(a)(5) violation could not be based thereon. The issue of mandatory vs. nonmandatory is not raised in this representation case.

[7] For example, when an employer has agreed to recognize a union on the basis of a showing of majority support demonstrated by authorization cards, the employer will be held to that agreement. See, e.g., *Goodless Electric Co.*, 332 NLRB No. 96, slip op. at 4 (2000), citing *Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F.2d 6877 (9th Cir. 1962). Similarly, the Board has required employers to honor agreements to recognize a union as the representative of employees in stores acquired after the execution of a collective bargaining agreement and to apply the contract to those employees, upon proof of majority support for the union. See, e.g., *Kroger Co.*, 219 NLRB 388 (1975). See also *Pall Biomedical Products Corp.*, supra (applying *Kroger*: employer violated statutory duty to bargain by revoking letter agreement to extend recog-

In *Briggs Indiana*, 63 NLRB 1270 (1945), the Board held that a union that promises not to represent certain categories of employees during the term of an agreement may not file a petition with the Board seeking to represent those employees during that period. The Board found that such a promise was a permissible limitation on the employees' right to choose a collective-bargaining representative, since the promise was for a reasonably brief period of time and the result of collective bargaining between presumptive equals. As the Board observed:

> The question here is not whether we should enforce the agreement so as to deny an individual Briggs plant-protection employee the right to select a UAW affiliate as his representative or so as to deny the protection of Section 8(a)(3) of the Act to such an employee. It is merely whether it is the proper function of the National Labor Relations Board to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve. It is the Union, not an employee, that is the moving party before the Board; it is the Union that seeks an election and the imprimatur of a Board certification. If, as the dissenting opinion suggests, "the contract should never have been made in the first place," the International may have good reason to regret the original commitment or to decline hereafter to renew it. But this Board should not take affirmative action to facilitate its avoidance. That is not the business of the Government of the United States. [63 NLRB at 1273.]

Briggs Indiana was recently reaffirmed by the Board in *Lexington House*, 328 NLRB No. 124 (1999). Noting that the *Briggs Indiana* rule "rests on the notion that a party should be held to its express promise," the Board in *Lexington House* emphasized: "If there is an express promise, we will enforce it, for a party ought to be bound by its promise." Id., slip op.at 3.

While the underlying dispute in this case does not involve a promise by a union to refrain from representing employees, the Board's reasoning in *Briggs Indiana* and *Lexington House* is nonetheless applicable. Through collective bargaining, the Petitioner and the Employer reached complete agreement establishing a procedure for voluntary recognition outside of the Board's processes. Under this Agreement, the Petitioner obtained significant rights to information about employees it is seeking to organize (including names and addresses), access to employees on the Employer's premises, a pledge of neutrality by the Employer during the Union's organizational efforts, prompt recognition of the Petitioner by the Employer upon a demonstration of majority support, and prompt commencement of good-faith bargaining with the Petitioner.

It is undisputed that the Petitioner invoked this Agreement for organizing the Employer's employees. As a result, it obtained information including the numbers and classifications of the employees at the Employer's various locations. When the parties were unable to agree on the scope of the bargaining units, the Petitioner invoked its right under the Agreement, over the Employer's objection, to have the unit issue decided by an arbitrator. Finally, in its March 29 letter to employees, the Union said that if the Employer did not agree to a card check, the Union would file an RC petition with the NLRB. The letter went on to state that, in such event, the Union could nonetheless then opt to return to the agreement.

Under these circumstances, we find that the Agreement bars the instant petition. Our finding is expressly premised on the fact that the Petitioner invoked the provisions of the Agreement in seeking to organize the Employer's employees. Had the Petitioner instead chosen to file a representation petition with the Board initially, and never invoked the Agreement, we would not find that the Agreement bars the petition.[8] Nor are we finding that the Petitioner would be barred from filing a petition if it could establish that the Agreement was no longer binding. Another determinative fact is that the Petitioner itself filed the petition in this case; we are not finding that the Agreement bars an election petition filed by another union or an unfair labor practice charge filed by an employee. We find only that, the Petitioner having invoked the Agreement, the fundamental policies of the Act can best be effectuated by holding the Petitioner to its bargain.[9] As the Board stated in *Lexington House*, "[t]o do otherwise would permit the Petitioner to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board for an election." 328 NLRB No. 124, slip op. at 4.

Our dissenting colleague misconstrues the posture of this case and our narrow holding here. The issue is not, as our colleague contends, whether the Petitioner "clearly and unmistakably" waived its right to file a representa-

nition to union at separate facility, if employee performing bargaining unit work was employed there). Accord *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (enforcing card-check and neutrality agreement, pursuant to Section 301 of Labor-Management Relations Act); *Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir.1992)(same).

[8] The Agreement does not provide that its procedures for voluntary recognition are the only procedures available to the Union.

[9] We are also not disturbing the Board's long-held view, relied on by the Regional Director, that it only infrequently defers to arbitration in representation proceedings.

tion petition. Rather, the issue is whether the Petitioner—having elected to proceed under the Agreement and derived benefits from it—should be permitted to pick and choose which provisions it wishes to invoke and which it prefers to avoid. The question, then, is really one of estoppel. (The Petitioner does not contend that the Agreement is no longer operative or applicable to this case.)

In our view, the policies of the Act can best be effectuated by holding the Petitioner to its bargain. We have applied the principle of estoppel in analogous circumstances. See, e.g., *Red Coats, Inc.*, 328 NLRB No. 28, slip op. at 2–3 (1999).[10] Here, by agreeing to a card-check and voluntary recognition procedure, the Employer was induced to believe that the Petitioner would not file a petition with the Board, and the Employer relied to its detriment on the Union's actions by providing information to the Union and proceeding to arbitration. It is for these reasons—and not, as the dissent asserts, "because of a pending arbitration on the scope of the appropriate unit"—that we hold that this Agreement bars this Petitioner from filing this petition at this time.

Accordingly, we dismiss the petition.[11]

ORDER

The petition in this case is dismissed.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

The decision I reach today is consistent with my decision in *Central Parking System*, 335 NLRB No. 34 (2001).

I write separately only to emphasize that whether and to what extent the Board should defer to an arbitrator's determination of an appropriate bargaining unit for purposes of determining the union's majority support, pursuant to an agreement that requires the arbitrator to apply the Act and the decisions of the Board and the courts, is an issue not squarely posed here. Nor do prior Board decisions address that precise question. One commentator has argued that such circumstances call for a different approach than cases involving representational issues such as unit accretions, where employees have no opportunity to choose or reject representation. Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 Berkeley J. Employment & Labor L. 50, 79–82 (1994). But I leave these questions for another day.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

My colleagues conclude that the Petitioner has waived its statutory right to petition the Board to represent the Employer's employees through the parties' Memorandum of Agreement Regarding Neutrality and Card Check Recognition (Agreement). The Agreement contains no such waiver. Accordingly, I disagree with my colleagues' conclusion that the Agreement bars the instant petition.

Waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Georgia Power Co.*, 325 NLRB 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). With respect to waivers involving the right to organize employees, the Board has held that an agreement not to organize will bar a petition only when there is an "*express* promise" by the union to refrain from seeking to represent the employees in question. See *Lexington House*, 328 NLRB No. 124, slip op. at 3 (1999); *Budd Co.*, 154 NLRB 421, 422–423 (1965); *Cessna Aircraft*, 123 NLRB 855, 857 (1959).

[10] In *Red Coats, Inc.*, supra, the employer voluntarily recognized the union as the representative of employees in three separate, single-location bargaining units. After 5 months of negotiations, the employer withdrew recognition of the union, on the basis that single-location units were inappropriate. The Board found that the employer was equitably estopped from taking that position. It observed:

> "[T]he key is that the estopped party, by its actions, has obtained a benefit." The benefit received here by the [employer] was the avoidance of a companywide union organizing campaign and the stabilization of labor relations. The policies of the act are not served by allowing the [employer] to use the process of voluntary recognition to gain this benefit, only to cast off this process when it does not achieve what it desires in negotiations.

328 NLRB No. 28, slip op. at 3 (footnotes omitted).

[11] Chairman Hurtgen notes that the concurring opinion herein relies on *Central Parking*, a case in which he dissented. His dissent is consistent with the general rule that the Board does not defer representation case issues to arbitration. The instant case represents a narrow exception to that rule. The exception is grounded on the facts that the Union has reaped the benefits of the arbitration agreement and has reserved the right to go back to that agreement. In these circumstances, he would not permit the Union to abandon that procedure.

Applying those principles here, there can be no argument that the Petitioner has "clearly and unmistakably" waived its right to file a petition with the Board seeking representation of the Employer's employees, or that it has "expressly promised" not to file a representation petition covering the Employer's employees. The parties' Agreement nowhere mentions, either explicitly or implicitly, any limitation on the filing of a representation petition with the Board. The majority even concedes that "[t]he Agreement does not provide that its procedures for voluntary recognition are the only procedures available to the Union." My colleagues do suggest that because the Petitioner "invoked" the Agreement, the Agreement bars the Petitioner's representation petition. They fail to offer any explanation, however, as to how the Agreement's language permits the filing of a representation petition prior to when the Agreement is invoked, but prohibits the filing of a petition after the Agreement is invoked.

One cannot reasonably find a "clear and unmistakable waiver" of the Petitioner's right to file a representation petition in Agreement section 3 (c) (1), which provides for arbitration of disputes over the description of appropriate bargaining units. This section contains no language stating that the Petitioner may not file a representation petition with the Board, or even stating that the Petitioner may not seek the Board's determination of the appropriate units. Nor can one find a clear and unmistakable waiver in the Petitioner's agreement to arbitrate the parties' dispute over the unit. When rendering unit determinations the Board may consider, among other factors, an arbitrator's award involving bargaining unit disputes. See, e.g., *Magna Corp.*, 261 NLRB 104, 105 fn. 2 (1982); *Westinghouse Electric Corp.*, 162 NLRB 768, 770–771 (1967). Thus, the Petitioner's agreement to arbitrate the parties' unit dispute is not inconsistent with an intent to seek a Board determination of the appropriate unit given that the parties could submit the arbitrator's award to the Board for its consideration. Accordingly, there is no basis for finding in the Petitioner's agreement to arbitrate the unit dispute a clear and unmistakable waiver of its right to have the Board make the ultimate unit determination.

My colleagues assert that the Petitioner is estopped from filing a representation petition with the Board because the Employer was induced to believe that the Petitioner would not file a petition based on the Petitioner's invocation of the Agreement, and the Employer has relied on that belief to its detriment. The elements of equitable estoppel are knowledge, intent, mistaken belief, and detrimental reliance.[12] Assuming for the sake of argument that the evidence establishes the first three elements, at this stage the only "detriment" that the Employer has suffered is that it has provided to the Petitioner information regarding the number and classifications of employees at various locations, and it has agreed to arbitrate the unit description dispute. The information that the Employer provided to the Petitioner is information that would be elicited in any event at a Board representation hearing involving the unit determination.[13] Given that the Employer is currently insisting that the Petitioner's petition be dismissed because the unit description dispute should be decided at arbitration, it is also difficult to understand how the Employer could view the arbitration as a detriment.[14] The significant benefits that the Employer would provide to the Petitioner, such as access to the Employer's premises, neutrality, and recognition upon receipt of signed authorization cards from a majority of the employees in the agreed-upon unit, would only be provided if the Petitioner elects to follow the card check processes under the Agreement. Accordingly, equitable estoppel is inapplicable at this time. Regardless of whether or not the bargain struck by the Employer under the Agreement is a fair one, the fact remains that the Employer could have easily avoided the result it complains of through the simple expedient of adding a single sentence to the Agreement that clearly states that the Petitioner waives its right to file a representation petition with the Board.[15]

Finally, my colleagues' decision to grant the Employer's motion to dismiss the Petitioner's representation petition because of a pending arbitration on the scope of the appropriate unit is in error for an additional reason. The Board has consistently held that it will not defer questions of representation to arbitration where determination of the issues does not depend upon contract interpretation but involves application of statutory policy, standards and criteria. See, e.g., *McDonnell Douglas Corp.*, 324 NLRB 1202, 1205 (1997*); St. Mary's Medical Center*, 322 NLRB 954 (1997); *Marion Power Shovel Co.*, 230 NLRB 576, 577–578 (1977). See also

[12] *R.P.C. Inc.*, 311 NLRB 232, 233 (1993); *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1383 (1987).

[13] See Case Handling Manual (Representation Proceedings) Sec. 11189(i).

[14] These "detriments" certainly do not seem to compare to the type of detriments suffered by those in whose favor equitable estoppel has been invoked. See e.g., *Red Coats, Inc.*, supra, slip op. at 2 (5 months of futile bargaining).

[15] I would like to emphasize here that I am not declining to hold the Petitioner to the commitments that it made under the Agreement. Rather, I am declining to hold the Petitioner to a waiver that does not exist.

Paper Manufacturers Co., 274 NLRB 491 (1985), enfd. 786 F.2d 163, 166 (3d Cir. 1986). The unit determination here cannot turn on contract interpretation because there is no contract.[16] Instead, the determination will turn solely on statutory policy, i.e., an analysis of community-of-interest factors, and thus is inappropriate for deferral to arbitration.

For the foregoing reasons, I would deny the Employer's motion to dismiss or hold the petition in abeyance.

Dated, Washington, D.C. August 27, 2001

Dennis P. Walsh, Member

[16] In recognition of this absence of contractual guidance, Agreement section 3 (c) (1) merely provides that the arbitrator shall be guided in making unit determinations "by the statutory requirements of the National Labor Relations Act and the precedential decisions of the National Labor Relations Board and Appellate reviews of such Board decisions."